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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 692

YORK ENGINEERING AND CONSTRUCTION COMPANY,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above-entitled case.

Opinion Below

The opinion of the Court of Claims (R. 78) is not yet officially reported.

Jurisdiction

The judgment of the Court of Claims was entered October 1, 1945 (R. 90-91). The judgment of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Questions Presented

First. Whether, in cases where the United States requires parties contracting with it to employ (except for supervisory, administrative and highly skilled workers) only persons referred for assignment to such work by the United States Employment Service and requires that at least ninety per centum of the persons employed shall have been taken from the public relief rolls, the United States is or is not under an implied contractual obligation either to supply and furnish to the contractor an adequate number of such persons, or to waive this contractual requirement.

Second. Whether the provisions of the Emergency Relief Acts, 49 Stat. 115 as amended by 50 Stat. 352, which recite that no person shall be retained in employment on the classes of public projects, Federal and non-Federal, set forth therein who is certified for relief and who refuses a bona fide offer of private employment under reasonable working conditions and with equivalent or better compensation, *do or do not have the legal effect of making the failure of officers of the United States to comply with and faithfully enforce these statutory requirements a breach of contract on the part of the United States* against parties who contract with the United States and who are obligated by such contracts to employ only those persons (except for administrative, supervisory and highly skilled workers) who shall have been formally referred for assignment to work on their undertakings under such contracts by the United States Employment Service, which is legally bound in all such instances to give preference to persons from the public relief rolls.

Third. Whether the refusal of the Court of Claims to accept and act upon credible, adequate and uncontradicted evidence as to the actual availability of relief labor and

other labor which was never referred for assignment to the petitioner in accordance with binding statutory requirements and which therefore, to the great damage of the petitioner, could never, under the terms of petitioner's contract with the United States, be utilized by it in the timely performance of its said contract does or does not constitute such arbitrary and unreasonable judicial action on the part of that Court as to justify corrective action in the premises by the Supreme Court in order to prevent a miscarriage of justice, and to preserve to the petitioner the full scope of its constitutional right to procedural due process of law.

Statutes and Regulations Involved

FEDERAL EMERGENCY RELIEF ACT OF MAY 12, 1933, 48 STAT. 55 AS AMENDED BY ACT OF FEBRUARY 15, 1934, 48 STAT. 351, 15 U. S. C. A., SEC. 721-728

Section 3. (a) There is hereby created a Federal Emergency Relief Administration, all the powers of which shall be exercised by a Federal Emergency Relief Administrator (referred to in this Act as the "Administrator") to be appointed by the President, by and with the advice and consent of the Senate * * *

(b) * * * The Administrator may, under rules and regulations prescribed by the President, assume control of the administration in any State or States where, in his judgment, more effective and efficient cooperation between the State and Federal authorities may thereby be secured in carrying out the purposes of this Act.

EXECUTIVE ORDER NO. 6442, NOVEMBER 22, 1933, 15 U. S. C. A., SEC. 721-728, PRESCRIBING RULES AND REGULATIONS UNDER THE FEDERAL EMERGENCY RELIEF ACT OF 1933 * * *

(1) The Federal Emergency Relief Administrator is authorized to assume control of the administration of relief

in any State where, in his judgment, more effective and efficient cooperation between the State and Federal authorities may thereby be secured in carrying out the purposes of said act.

EMERGENCY RELIEF APPROPRIATION ACT OF APRIL 8, 1935, 49 STAT. 119, 15 U. S. C. A., SEC. 721-728

Section 10. Until June 30, 1936, or such earlier date as the President by proclamation may fix, the Federal Emergency Relief Act of 1933, as amended, is continued in full force and effect.

RESOLUTION OF JUNE 29, 1937, 50 STAT. 352, AS AMENDED JUNE 21, 1938, 52 STAT. 817, 15 U. S. C. A., SEC. 721-728

TITLE I

• • • there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to remain available until June 30, 1938, and to be used in the discretion and under the direction of the President, $1,500,000,000 together with such unexpended balance, as the President may determine, of appropriations made by (a) the second paragraph of the Emergency Relief Appropriation Act of 1936, as supplemented by the First Deficiency Appropriation Act, fiscal year 1937, and (b) section 1 of the Emergency Relief Appropriation Act of 1935, including the unexpended balances of appropriations referred to therein: • • • Provided further, That no portion of the funds hereby appropriated shall be allocated or used for any purpose except to provide relief or work relief for persons in need: • • • Provided, That no person employed on work projects and certified as in need of relief who refuses a bona fide offer of private employment under reasonable working conditions which pays as much or more in compensation for the

same length of service as such person receives or could receive under this appropriation and who is capable of performing such work, shall be retained in employment under this appropriation for the period such private employment would be available: • • •

Sec. 2. In carrying out the purposes of the foregoing appropriation the President is authorized (a) to prescribe such rules and regulations as may be necessary and to utilize agencies within the Government and to empower such agencies to prescribe rules and regulations to carry out the functions delegated thereto by the President • • •

TITLE II

Sec. 201. The Federal Emergency Administration of Public Works (herein called the 'Administration') is hereby continued until July 1, 1939, and until such date is hereby authorized to continue to perform all functions which it is authorized to perform on June 29, 1937. All provisions of law existing on June 29, 1937, and relating to the availability of funds for carrying out any of the functions of such Administrations are hereby continued until July 1, 1939, except that the date specified in the Emergency Relief Appropriation Act of 1936, prior to which, in the determination of the Federal Emergency Administrator of Public Works (herein called the 'Administrator'), a project can be substantially completed is hereby changed from "July 1, 1938" to "July 1, 1939."

RESOLUTION OF JUNE 21, 1938, 52 STAT. 809, 15 U. S. C. A. SEC. 721-728

Section 10 • • • Provided, That in order to insure the fulfillment of the purposes for which such appropriations are made and to avoid competition between the Works Progress Administration and other Federal or non-Federal

agencies in the employment of labor on construction projects of any nature whatsoever, financed in whole or in part by the Federal Government, no relief worker shall be eligible for employment on any project of the Works Progress Administration who has refused to accept employment on any other Federal or Non-Federal project at a wage rate comparable with or higher than the wage rate established for similar work on projects of the Works Progress Administration: • • •

50 STAT. 533, CHAP. 520, JULY 23, 1937

AN ACT To confer jurisdiction on the Court of Claims to hear, determine, and enter judgment upon the claims of contractors for excess costs incurred while constructing navigation dams and locks on the Mississippi River and its tributaries.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and enter judgment against the United States upon the claims of the several contractors for alleged excess costs incurred in the execution of their respective contracts, entered into since June 16, 1933, for the construction of locks and dams for the improvement of navigation on the Mississippi River and its tributaries, by reason of the Government having promulgated and enforced, as alleged, due, as alleged, to the national emergency and subsequent to the dates of the several contracts, rules and regulations referred to in the several contracts, and misinterpreted and wrongfully enforced or disregarded, as alleged, and rules and regulations not referred to in and inconsistent with the respective contracts, as alleged, which rules and regulations, the enforcement or disregard thereof, deprived the contractors of normal control of their per-

sonnel, as alleged, and further by reason of the Government having failed, as alleged, to supply qualified labor under the labor clauses of the respective contracts, resulting in excess costs, including general overhead and depreciation, to the said several contractors on their respective contracts, as alleged; the said judgment or decrees, if any, to be allowed notwithstanding the bars or defenses of any alleged settlement or adjustment heretofore made, res judicata, laches, or any provision of law to the contrary.

This Act shall not be interpreted as raising any presumption or conclusion of fact or law but shall be held solely to provide for trial upon facts as may be alleged.

Review of such judgment may be had by either party in the same manner as is provided by law in other cases in such court.

Approved, July 23, 1937.

EXECUTIVE ORDER NO. 7060, JUNE 5, 1935, PRESCRIBING RULES AND REGULATIONS RELATING TO PROCEDURE FOR EMPLOYMENT OF WORKERS UNDER THE EMERGENCY RELIEF APPROPRIATION ACT OF 1935.—REGULATION NO. 2, WORKS PROGRESS ADMINISTRATION.

Section 5. Only persons certified for assignment to work by the United States Employment Service shall be employed on projects: Provided That for the purpose of effectuating the purposes of paragraph I (C) of Executive Order No. 7034 of May 6, 1935, the Works Progress Administrator or the State Works Progress Administrators are hereby authorized in their discretion to modify this requirement in connection with any project not operated under contract.

Section 6. All persons (a) who are employed on projects conducted by the State Emergency Relief Administration and continued by the Works Progress Administration, and

who are otherwise eligible, or (b) who are certified by the United States Employment Service as eligible for employment on projects to be conducted by the Works Progress Administration shall be regarded as continuously certified for assignment to work on projects to be conducted by the Works Progress Administration unless they are requisitioned by the United States Employment Service for employment on other projects, in other public work, or in private industry. (Executive Order No. 7060, Regulation No. 2, was referred to and made a part of the contract sued upon in the present action, in Article 19 thereof as amended R. 28).

Statement of the Case

The contract, the breach of which is the ground of the present action, was entered into by petitioner and the United States on August 5, 1935. This contract was designated ER-W 1101-eng.-3, and by its terms petitioner agreed to furnish all materials and do all the work necessary for the construction of Lock and Dam No. 9, Allegheny River, and alterations to Dam No. 8, Allegheny River.

The contract covered the terms and conditions for a Civil Works Authority Project which was designed and intended for the purpose of giving employment and taking people off public relief rolls. This project had been planned a considerable time in advance of the date of the contract and its time of construction was accelerated in order to give immediately an opportunity for the employment of relief labor. The contract, Article 19 (a), provided that only persons specifically referred for assignment to petitioner by the United States Employment Service should be employed. The contract also provided that preference should at all times be given to persons on the public relief

rolls, and that at least ninety per cent of the persons employed should have been taken from the public relief rolls.

The contract provided that work should be commenced within ten calendar days after receipt of notice to proceed, and should be completed within four hundred and fifty calendar days from the date of notice to proceed. Petitioner received notice to proceed on September 25, 1935.

The contract was finally completed on or about October 6, 1938, after the time for the performance of the contract had been extended altogether 657 days by virtue of nineteen change orders. Part of these delays were caused by changes in the contract quantities and in the character of the work to be performed as specified by directions of the contracting officers acting on behalf of the United States. A large portion of these delays, totalling 149 days, was caused by the inability of the petitioner to obtain from the employment office an adequate number of workmen to staff the job. It is the delays thus caused that are relied upon by the petitioner as the basis and source of most of petitioner's claims for damages. Petitioner claims that the work could have been entirely completed by November 2, 1937, if these delays, which were due to labor shortages exclusively, had been eliminated. While there was a dispute between the parties as to whether the extensions of time granted by the change orders because of labor shortages were correctly figured the Court finding that such delays through 1937 totaled 103 days (R. 54) rather than the 131 days actually granted, the adoption of the lesser figure is of no importance. Work was resumed in 1938 on April 24th, but the undisputed evidence was that it required through June 14, 1938 to repair the damage caused by winter floods. From June 14, 1938 to the completion of the work on October 6, 1938 constituted an elapsed time of 114 days. During this time Change Order No. 18 granted petitioner ad-

ditional time, for labor delays in 1938, of 18 days, which the respondent claimed at the trial should have been 12.30 days. On either basis the elapsed working time in 1938, less the delays caused by labor shortages, was less than the admitted delays prior to 1938, so that regardless of the method of figuring used, petitioner, if furnished an adequate supply of labor, would have completed the contract in 1937.

All of the damages which petitioner claims were due to the carrying over of the work through the winter and spring of 1938, which damages would not have resulted had the project been completed in 1937. Substantially all of these damages had been stipulated as between the petitioner and the attorneys for the Department of Justice. The legal issue is as to whether the damages thus agreed upon are recoverable as against the United States as damages caused by breach of contract on the part of the United States.

The essence of the dispute in this case is as to whether, so long as the limitations which the contract placed upon petitioner's sources of labor were maintained in force and operation, the United States was or was not impliedly obligated to furnish and supply an adequate quantity of reasonably competent labor through its agencies, the United States Employment Service and the Works Progress Administration. If the United States was so obligated, the failure to perform this obligation had a continuous effect in delaying the timely performance of the work by the petitioner. All of the items of damage relied upon in the present petition for certiorari are based upon these delays caused by the labor shortage on petitioner's project.

The instant action was instituted in the Court of Claims on or about October 18, 1940. The petitioner alleged sixteen causes of action, of which twelve were based upon

the ground that the failure of the United States, through its various agencies, to furnish and supply the labor necessary to staff the job was a breach of the implied obligations of the United States under the labor clauses of the contract.

Petitioner introduced ample evidence to establish that there was abundant labor to staff petitioner's project (which only required 600 to 650 men in continuous service) available in the general vicinity where petitioner's project was to be performed. This available labor consisted (a) of men on the public relief rolls, and (b) of unemployed labor not on the public relief rolls, eligible for certification to this project under Executive Order No. 7060.[1] The employment offered by petitioner was the equivalent of private employment. But no adequate steps were taken by the agencies of the United States to facilitate the transfer of relief workers to petitioner's employment, although such a transfer could have been accomplished if the officers of the United States had obeyed the statutory mandate (50 Stat. 352).[2] And since the requirement that only workers referred for assignment to petitioner by the United States Employment Service could be employed was never waived, petitioner was never able to invade the general labor market and procure the necessary labor force from the ranks of those not on relief and not otherwise formally "referred" to it. There was at all times an adequate supply of employables available for work on this project from the general labor market.

The change orders were accepted by petitioner only on the basis of an express statement, concurred in by the District Engineer, U. S. Engineers Office, that the change orders did not limit or restrict to any extent whatsoever the right

[1] Supra p. 7.

[2] Supra p. 4.

of the petitioner to make or prosecute any claim whatsoever under the basic contract (R. 67).

The report of the Commissioner of the Court of Claims, duly designated to hear and receive the evidence, was filed on March 11, 1944. Thereafter the case was argued on the merits before the Court of Claims. The opinion of that Court was announced on February 5, 1945. The Court refused recovery to petitioner except for damages to the amount of $4,669.88, based on petitioner's fourteenth cause of action. That cause of action claimed damages flowing from the Government's raising of wages on W. P. A. projects, which, in turn, forced petitioner to raise wages on its project. The judgment is unconnected with any of the issues raised in this petition.

One judge dissented in such terms as to indicate the acceptance by him of most, if not all, of petitioner's contentions (R. 89).

The judgment of the Court of Claims embodying the conclusions above stated was entered on October 1, 1945.

Specification of Errors

First. The Court of Claims erred in rejecting the petitioner's interpretation of the provisions of Article 19 (a) of the contract which was stated by petitioner in its reply brief in the following language: "We submit that under Article 19 of the contract the defendant undertook the responsibility of supplying plaintiff with sufficient workers to properly staff the job" (R. 79).

Second. The Court of Claims erred in holding that the duty of the Government under the provisions of Article 19 was merely "to apply the provisions of the article with fair consideration for the problems and difficulties of the contractor, and to make it possible for him to get his work

done, if there was not enough relief labor available, but there were persons not on relief who desired to work for the plaintiff'' (R. 79).

Third. The Court of Claims erred in holding, in spite of adequate and uncontradicted evidence set forth in the record against its conclusion, and without any direct evidence set forth in the record to support its conclusion, that ''it would have made no substantial difference in the plaintiff's labor situation if the Government had cancelled Article 19 of the contract'' (R. 82).

Fourth. The Court of Claims erred in failing to give proper effect to the provisions of the Emergency Relief Act of 1937, 50 Stat. 352, 15 U. S. C. A., 721-728,[3] and in failing to treat as a breach of contract with petitioner the refusal and failure of officers in charge of work relief in the area where petitioner's project was under operation to remove from the relief rolls in accordance with the statutes of the United States and the regulations of the President properly applicable thereto, sufficient personnel to properly staff the work on petitioner's project, and their refusal or failure to take those other steps and proceedings legally required by the statutes and the regulations, which, if taken, would have had the effect of causing and inducing sufficient numbers of qualified men then and there on the public relief rolls to start and continue actual labor on petitioner's project at such times and under such conditions as would, in fact, have brought about the timely completion of said project.

Fifth. The Court of Claims erred in disposing of petitioner's contention that respondent's violation of the provisions of 50 Stat. 352[4] was, in legal effect, a breach of con-

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[3] Supra p. 4.

[4] Ibid.

tract on the part of the United States on the basis of the following proposition stated in its opinion: "We think it has not been proved that the refusal of the relief authorities to thus forcibly recruit workmen for the plaintiff was so inconsiderate of the plaintiff's difficulties as to be a breach of the Government's implied contract" (R. 81).

Sixth. The Court of Claims erred in holding (R. 84) that "Even if we were of the opinion that the insufficiency of the labor supply was a breach of contract by the Government, we would not have evidence as to the amount of damage resulting from it, for the period from June 15, 1938, to the completion of the work."

Reasons for Granting the Writ

First. It is a matter of great practical importance both to the United States and to the independent contractors that the meaning and legal effect of contractual provisions requiring the employment exclusively of persons referred for assignment by the United States Employment Service, and that ninety per cent of such employees should be taken from the public relief rolls, be clarified and, if possible, settled in a comprehensive manner.

Second. The decisions of the Court of Claims on the question of the interpretation of these standard contractual provisions with reference to the sources of labor to be employed on projects financed by the Government have been in direct conflict, as is evidenced by a comparison of the decision in *Young-Fehlhaber Pile Co.* v. *United States*, 90 C. Cls. 4, with the decision in the instant case. This doctrinal instability on the part of the Court of Claims not only has produced serious inequality as amongst various contractors who have sought relief in the Court of Claims, but also has created and will continue to create great and harmful

uncertainty as to the future effect of these standard contractual provisions in the minds of all persons called upon to calculate costs and to prepare estimates and bids in connection with any contract with the United States in which these labor clauses are present.

Third. The present controversy is representative of an important group of substantially similar cases which have been decided by the Court of Claims or which are still pending. In all of these cases the legal effect and significance of standard contractual provisions relating to the employment of relief labor has been in dispute and no clear and comprehensive ruling has yet been enunciated by the Court of Claims.

Fourth. The possible and reasonable application of the constitutional doctrines as to the procedural requirements of due process of law under the terms of the Fifth Amendment to decisions of the Court of Claims reached in contradiction of the available evidence and without any affirmative evidence in the record to support them should be reviewed by the United States Supreme Court, in order to maintain constitutional safeguards and remove "constitutional doubts" as to procedural practices actually followed in an important legislative court.

Conclusion

The foregoing errors and reasons for granting the writ asked for will be discussed in a short brief accompanying this petition.

The writ of certiorari here petitioned for should be allowed by the Supreme Court of the United States.

ROBERT P. SMITH,
CHARLES S. COLLIER,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 692

YORK ENGINEERING AND CONSTRUCTION COMPANY,

Petitioner,

vs.

THE UNITED STATES,

Respondent

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Argument on Specification of Errors

First. The Court of Claims erred in rejecting the petitioner's interpretation of the provisions of Article 19 (a) of the contract, which was said by the Court of Claims to have been stated by petitioner in its reply brief in that Court in the following language: "We submit that under Article 19 of the contract the defendant undertook the responsibility of supplying plaintiff with sufficient workers to properly staff the job" (R. 79).

The problems of this case center around the interpretation of Article 19 (a) of the contract, which reads as follows:

"Article 19 (a) *Labor preferences.*

"With respect to all persons employed on projects, except as otherwise provided in Regulation No. 2, (a), such persons shall be referred for assignment to such work by the United States Employment Service, and (b) preference in employment shall be given to persons from the public relief rolls, and, except with the specific authorization of the Works Progress Administration, at least ninety per centum (90%) of the persons employed on any project shall have been taken from the public relief rolls: *Provided, however,* that, expressly subject to the requirement of subdivision (b), the supervisory, administrative, and highly skilled workers on the project, as defined in the specifications, need not be so referred by the United States Employment Service."

A provision identical in terms with the foregoing was the basis of the litigation in the case of *Young-Fehlhaber Pile Co.* v. *U. S.*, 90 C. Cls. 4. The Court of Claims in that case permitted recovery against the United States on facts presenting no legally significant distinction as compared with the present case. The Court of Claims presented the essential doctrine then accepted in the following statement in its opinion in the *Young-Fehlhaber* case, at p. 13:

"There is in fact no provision in the contract that defendant should furnish a sufficient supply of labor, and nothing is said therein with reference to the plaintiff being entitled to recover damages in case such a supply was not furnished. The nature of the contract, however, was such that we think it carried an implied agreement to furnish the men necessary to carry on the work. It must have been understood between plaintiff and the defendant's agents who prepared and executed the contract that plaintiff would be permitted in some way to obtain a sufficient force to carry on the work contemplated thereby. The provisions contained in the contract with reference to the source from which the plaintiff should obtain its workers surely were not understood

by the parties to mean that if the workmen could not be so obtained the plaintiff would not be permitted to obtain the necessary workmen to complete the contract. Under any other construction, we would have in one part of the contract a provision that plaintiff must complete it within a certain time, and in another part a provision which meant that it could not be completed in event there was a shortage of workmen."

"• • • We • • • conclude that the contract in the case at bar carried an implied provision that the defendant would furnish the necessary workmen to complete the work within the required time. It follows that by its failure so to do the defendant breached the contract and was liable in damages."

"In *Black* v. *Woodrow*, 39 Md. 194, 215, it is said:

" 'It not infrequently occurs that contracts on their face and by their express terms appear to be obligatory on one party only; but in such cases, if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the other party, such corresponding and correlative obligation will be implied. Thus, if the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do or allow to be done the act or things necessary for the completion of the contract will be necessarily implied.' " 90 C. Cls. 4, at 13.

In the present case, however, the Court of Claims announced an essentially different doctrine in interpreting Article 19 of the contract (identical in wording with the contract provision discussed in the *Young-Fehlhaber Pile Co.*

case). In its opinion in the present case, the Court of Claims stated:

"We think, therefore, that Article 19 was a promise by the plaintiff not to employ labor except as therein provided. We think it also, by implication, contained a promise by the Government to apply the provisions of the article with fair consideration for the problems and difficulties of the contractor, and to make it possible for him to get his work done, if there was not enough relief labor available, but there were persons not on relief who desired to work for the plaintiff" (R. 79).

In the Young-Fehlhaber opinion the central doctrine is that Article 19(a) "carried an implied provision that the defendant would furnish the necessary workmen to complete the work within the required time." In the present case, the central doctrine laid down by the Court of Claims is that the United States impliedly promises "to make it *possible* * for him (the contractor) to get his work done, if (even though) there was not enough relief labor available, but there were persons not on relief who desired to work for the plaintiff." The vital difference between the two formulas lies in the *treatment of the time element* and the relatively large extra costs and losses which any substantial retardation in the execution of the work due to labor shortages must inevitably place on the contractor. The formula laid down in the present case means that the United States must make it *possible* for the contractor to get his work done *ultimately*. But to afford the bare possibility of getting the work done ultimately is very different from the requirement of genuine cooperation. To permit the infiltration of non-relief labor that is formally referred by the United States Employment Service after serious

* Italics supplied.

technical delays and that *desires* to work for the contractor is radically different from *furnishing* the "necessary workmen." And to furnish the necessary workmen to get the work done within the *necessary time* is radically different from making it *possible* for the contractor to get his work done after 657 days beyond the original contract period had elapsed, a large percentage of these extra days being required (as admitted by both parties in this case) exclusively because of long continued labor shortages on the job in question, shortages that were quite beyond the power of the petitioner to remedy.

Now which of these two doctrines as to the interpretation and application of Article 19(a) is the correct one? The question is of general interest, not only with respect to cases which have occurred in the past, but also with regard to contracts that may be entered into in the future.

It may be proper to add that many of the criticisms directed against the doctrine of the Young-Fehlhaber Pile Co. decision wholly fail of their mark if that decision be interpreted not as requiring the United States in all cases, as a matter of inescapable obligation, to furnish adequate labor from the relief rolls or from other sources to complete the work upon any Public Works Project within the necessary time, but rather as imposing upon the United States a duty of an alternative nature, either to furnish the necessary labor or to *waive* the *requirement* that only workers directly referred to the work by the United States Employment Service be employed. Under the latter interpretation, the United States need never incur any liability. For in all cases where the United States, through its various agencies, finds itself unable readily to furnish the necessary labor force for a particular project, the United States, through its contracting officers, may waive the requirement that only workers so referred or furnished be employed.

Thus, the United States can in all cases transfer at will to the contractor the burden of securing that part of the necessary working staff which has not been "referred" to him in a timely manner by the appropriate government agencies.

But the gulf between the doctrine of the Young-Fehlhaber decision even when thus interpreted and the doctrine formulated and acted upon in the present case remains too broad to be bridged by compromise formulas and too deep to be explained away on the basis of minor diversities of fact as between the two groups of cases litigated. The choice among the applicable legal doctrines, in view of the long continued failure of the Court of Claims to find and maintain a satisfactory central position on these questions, can now be made effectively only by the intervention of the United States Supreme Court. The successful operation of Public Works Projects as a means of relieving unemployment and economic waste in the future largely depends upon the willingness of the Supreme Court to accept the responsibility of presently announcing guiding principles in this important field of legal controversy.

Second. The Court of Claims erred in holding that the duty of the Government under the provisions of Article 19 was merely "to apply the provisions of the article with fair consideration for the problems and difficulties of the contractor, and to make it possible for him to get his work done, if there was not enough relief labor available, but there were persons not on relief who desired to work for the plaintiff" (R. 79).

The Court of Claims rejected petitioner's interpretation of Article 19 of the contract and, in place thereof, substituted an affirmative interpretation of its own which is stated in the language recited in this specification of error.

The expression "fair consideration for the problems and difficulties of the contractor" suggests a moral rather than

a legal standard. Taken by itself, this expression is perhaps too indefinite to enable the reader to ascertain the precise test which the Court intended to lay down, but the wording used seems plainly to indicate a test different from the test of reasonable diligence on the part of the officers of the United States. The test of reasonable diligence appears to have been relied upon by the Court of Claims in the cases of *Seeds & Durham* v. *The United States*, 92 C. Cls. 97, and *Frazier-Davis Construction Co.* v. *The United States*, 100 C. Cls. 120. In the *Frazier-Davis* opinion, the Court says, at p. 160: "As to plaintiff's allegation that defendant failed to promptly furnish labor as needed, the evidence shows that there was no unreasonable delay in referring labor as promptly as was possible under the circumstances. Defendant acted diligently and did all it could to refer all labor requisitioned by plaintiff • • • Defendant was only bound to act with reasonable promptness in referring workmen when requested and was not bound by any stipulation to have such workmen report for work within any stated period of time." But this doctrine that the United States is only bound to act with reasonable diligence still assumes that the United States is obligated affirmatively to supply and furnish the labor requisitioned by any contractor, obligated by contract terms similar to those of Article 19 of the present contract. The doctrine of the present opinion that the duty of the United States is merely to apply the provisions of this Article with "fair consideration of the problems and difficulties of the contractor" does not recognize the duty of reasonable diligence in discharging an assumed affirmative duty to furnish the labor requisitioned. And furthermore, as set forth more fully in the discussion of the third specification of error, the Court of Claims did not effectively apply its own test of "fair consideration." The Court did not in fact act on the

view that officers of the Relief Administration or the United States Employment Service were legally obligated to bring about the transfer to petitioner of such numbers of laborers then on the relief rolls as would actually suffice to staff the work on petitioner's project.

The meaning attributed by the Court of Claims to the formula used in the present case is best ascertained from the concluding clauses of the statement quoted in the present specification of error. The duty of the Government is stated to be "to make it possible for him (the contractor) to get his work done." Merely to make it possible for the contractor to conclude his work at some indefinite period in the future does not imply that the Government is obligated to make diligent efforts or to apply a standard of reasonable affirmative activity in order to supply and furnish the labor. The statement does not include the important element that the Government should make it possible for the contractor to get his work done *on time* and *without avoidable extra expense*. If the statement is to be taken in its natural and probable sense, it means that the duty of the Government is merely to refrain from obstructionist tactics so that the contractor will be permitted, in the long run, to get his work done somehow, albeit with excess cost due to increased overhead and maintenance expenses during the extensions of time.

Again the formula of the Court is open to criticism in reciting that it is the duty of the Government "to make it possible for him (the contractor) to get his work done, if there was not enough relief labor available, but there were persons not on relief who desired to work for the plaintiff." This statement of the Court gives an ambiguous and misleading impression. There was abundant relief labor "available" in one sense but not "available" without helpful affirmative action by the United States Em-

ployment Service and the Works Progress Administration authorities in excluding such persons from the relief rolls when they rejected opportunities of private employment, that is, when they were referred or ought to have been referred for assignment to work on petitioner's project and did not, in fact, engage in or start upon such work. Again there were persons not on relief who were actually *obtainable* for the work in question but who were not registered with the United States Employment Service and who did not "desire to work for the plaintiff" in such a sense that they were willing to get registered with the United States Employment Service and cooperate throughout the slow mechanics of the referral process. If the Government has appropriated millions of dollars to be spent on construction projects chiefly for the very purpose of creating opportunities for employment, then the duty of the United States Employment Service to facilitate the transfer of relief labor to the work on such projects is plain and, if the agencies of the Government, whether it may be the United States Employment Service or the Works Progress Administration, refused or failed to bring about such transfers of necessary labor, a contractor who was undertaking the execution of a construction project for the Government is entitled to treat this failure on the part of the agencies of the Government as a breach of contract on the part of the United States. Any construction contractor who bids on contracts of the same nature and classification as the contract presently under litigation is entitled to act upon this fair and natural interpretation as to the legal obligations assumed by the United States. (See also Executive Order 7060,[5] Regulation No. 2, included in the present contract as amended.)

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[5] Supra p. 7.

The "fair consideration" formula relied on by the Court of Claims in the present case relieves the United States of any affirmative duty with reference to supplying labor, and would apparently require a liability only in the case of an unjustifiable positive act of interference chargeable to the United States which in fact delayed the execution of the contract, or in cases where the failure of the agencies of the United States to cooperate has been so complete that the contractor has not been able, because of such failure, to complete the contract at all. Such a loose test as to the duty of the United States under the implied obligations of the contract here in question would certainly serve as a radical deterrent to the acceptance by independent contractors of labor provisions of this sort in the future negotiation of contracts with the United States throughout a long period of time to come. The ultimate result would probably be to hinder the United States seriously in the execution of relief projects of this nature whereby new opportunities of employment could be created in periods when private industry is depressed.

Third. The Court of Claims erred in holding, in spite of adequate and uncontradicted evidence set forth in the record against its conclusion, and without any direct evidence set forth in the record to support its conclusion, that "it would have made no substantial difference in the plaintiff's labor situation if the Government had cancelled Article 19 of the contract."

The opinion of the Court of Claims might almost be said to have been expressed in the alternative. It states that the United States did not violate its contractual obligations, but nevertheless at several points the position is taken that, even assuming that the United States had violated its contract, these breaches of contract were not the cause of the delays from which petitioner suffered so much damage. No

subtle theory of causation is involved, but merely the apparent belief on the part of the Court of Claims that the damage would have happened just the same, even if the United States had waived the requirements of Article 19. The Court states, at R. 82, "We think it would have made no substantial difference in the plaintiff's labor situation if the Government had cancelled Article 19 of the contract. The plaintiff had a shortage of labor because there were not enough men, at the place and time, who wanted to work for the plaintiff, so it cannot recover, unless the Government guaranteed to put enough men into the plaintiff's employ and keep them there, to man the job adequately, or pay the plaintiff damages if there should be a shortage, however unavoidable."

The statement of the Court of Claims that there would have been a shortage of labor even if the requirements of Article 19 had been wholly dispensed with is entirely gratuitous and without support in the record. There is plain and uncontradicted evidence in the record to show that there was abundant qualified labor available in the district. There was evidence that there were hundreds of men willing to work who applied to the petitioner for employment but whom petitioner could not directly employ because petitioner was not permitted, under the terms of its contract, to employ men "off the street." Petitioner sent or actually transported many of these applicants to the offices of the United States Employment Service but the ultimate result was that, under the complicated system set up by the United States Employment Service for processing such applicants, very few of these men were actually employed on petitioner's project.

Again there was abundant evidence to show that there was enough labor "available" on the public relief rolls in the district where petitioner's project was located so

that there would inevitably have been an abundant labor supply for the petitioner's needs if the binding statutory requirements had in fact been complied with and such available labor had been removed from the relief rolls in cases where the laborers in question were referred for assignment to petitioner and did not in fact engage in or start upon work for the petitioner. In order to underscore this important point, petitioner asks the permission of the Court to take the unusual course of attaching to this petition and brief a copy of an important exhibit introduced in evidence before the Court of Claims consisting of a certificate from the Secretary of Labor and Industry of the Commonwealth of Pennsylvania, which sets forth the numbers of persons in selected occupational groups as registered month by month in the offices of the Pennsylvania State Employment Service and drawing relief payments during the period from August 1935 to October 1938, a period which covers the entire operation of the present contract.

The petitioner asks this unusual privilege because it asserts and maintains that the denial by the Court of Claims of any recognition of this credible and self-sufficient official record constitutes arbitrary and unreasonable action on the part of that Court in violation of the rights of the petitioner to procedural due process of law. This exhibit is not even mentioned in the opinion of the Court of Claims. That Court seems to have missed entirely the significance of the affirmative proof thus presented, proof which was never contradicted or offset by any other evidence.

Fourth. The Court of Claims erred in failing to give proper effect to the provisions of the Emergency

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[6] Supra p. 4.

Relief Act of 1937, 50 Stat. 352, 15 U.S.C.A. 721-728,[6] and in failing to treat as a breach of contract with petitioner the refusal and failure of officers in charge of work relief in the area where petitioner's project was under operation to remove from the relief rolls, in accordance with the statutes of the United States and the regulations of the President properly applicable thereto, sufficient personnel to properly staff the work on petitioner's project, and their refusal or failure to take those other steps and proceedings legally required by the statutes and the regulations, which, if taken, would have had the effect of causing and inducing sufficient numbers of qualified men then and there on the public relief rolls to start and continue actual labor on petitioner's project at such times and under such conditions as would, in fact, have brought about the timely completion of said project.

This question was adequately presented in petitioner's brief before the Court of Claims but was substantially ignored in the opinion of that Court, notwithstanding its vital significance for the decision of this case and many other like cases.

The Emergency Relief Act of 1937, 50 Stat. 352,[7] 15 U. S. C. A. 802, 803, amending the Act of 1935, 49 Stat. 115, appropriates $1,500,000,000 for work relief and further provides as follows:

"Provided, That no person employed on work projects and certified as in need of relief who refuses a bona-fide offer of private employment under reasonable working conditions which pays as much or more in compensation for the same length of service as such person receives or could receive under this appropriation and who is capable of performing such work, shall be retained in employment under this appropriation for the period such

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[7] Supra p. 4.

private employment would be available: * * *'' (See also Executive Order 7060,[8] Regulation No. 2, which was issued on June 5, 1935, under authority of the Emergency Relief Act of 1935, 49 Stat. 119[9]).

The claimant in this case contracted independently with the United States through the War Department and the employment it offered to workmen was private employment within the meaning of the provisions of the Emergency Relief Act just quoted. Although this statutory proviso was enacted in terms after the date of petitioner's original contract with the United States, yet it was in force during the working seasons of 1937 and 1938, during which time a large percentage of the work on the contract now in suit was performed. Furthermore, this proviso is really declaratory of the essential meaning and purpose of relief statutes enacted prior to the formation of the present contract. (See Executive Order 7060,[10] especially Regulations No. 2 and No. 6 thereof, which were issued under the authority of the Emergency Relief Act of 1935,[11] 49 Stat. 115.) The faithful enforcement of this provision would have greatly accelerated the completion of the work by facilitating the movement to petitioner's employment of men on the public relief rolls who were referred or ought to have been referred for assignment to work on petitioner's project but who did not, in fact, engage in or start upon such work. If the labor actually ''available'' in this sense on the relief rolls had been transferred effectively to work on petitioner's project, that project would have been brought to a completion in October or November of 1937 and the damages, the recovery of which is now sought from the United States, would not have occurred.

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[8] Supra p. 7.

[9] Supra p. 4.

[10] Supra p. 7.

[11] Supra p. 4.

There can be no doubt that these provisions impose a definite legal duty upon the officers of the United States in charge of the expenditure of the funds appropriated under the Emergency Relief Acts. It seems correct also to say that these provisions mean that the United States in its legislative capacity has created duties which rest upon the United States itself as a contracting party. (Compare *Perry* v. *The United States*, 294 U. S. 330, 55 S. Ct. 432, 79 L. Ed. 912; *Lynch* v. *The United States*, 292 U. S. 571, 54 S. Ct. 840, 78 L. Ed. 1434.)

But do these provisions create also legal rights vested in parties contracting with the United States so that such parties may treat such a breach of legal duty by the United States as a breach of their contracts and a ground for the recovery of damages thereby caused? Does the public wrong, the violation of a public statute, create a private right of action in favor of those injured by the wrong?

The Restatement of Contracts (as adopted and promulgated by the American Law Institute), Section 315 defines breach of contract in general terms as follows:

> "1. Prevention or hindrance by a party to a contract of any occurrence or performance requisite under the contract for the creation or continuance of a right in favor of the other party, or the discharge of a duty by him, is a breach of contract, unless
>
> "(a) The prevention or hindrance is caused or justified by the conduct of the other party, or
>
> "(b) The terms of the contract are such that the risk of such prevention or hindrance as occurs has been assumed by the other party."

On the assumption that the United States violated a legal duty in failing to withhold payments and allowances under the Emergency Relief Acts to persons who were referred or ought to have been referred for assignment to work on petitioner's project pursuant to the statutes

and regulations legally applicable, we have clearly an instance of the "prevention or hindrance" by the United States of an occurrence, namely, the free flow of labor requisite under the contract for the "discharge of a duty" by the claimant, namely, claimant's duty under Article 19 of the contract to employ only workmen referred for assignment to this work by the United States Employment Service, "preference" in employment being given to persons from the public relief rolls. Furthermore, this prevention or hindrance is wrongful, not only on the general ground that it tends strongly to prevent the due and timely performance by the claimant of its duties, but also on the additional ground that such prevention or hindrance is specifically forbidden by the Emergency Relief Act of 1937, 50 Stat. 352,[12] and such prevention or hindrance is made legally wrongful on the grounds of public policy. Where there is legally wrongful conduct causing harm to a party entitled to protection or exemption from such harm, a remedial action in favor of such a party should become available.*

The treatment by the Court of Claims of this important issue in its opinion in the present case was peculiarly inadequate. The Court said, at R. 81, "It may be that it (the Government) could have, by the closing down of relief work projects in adjacent areas compelled men to take jobs with the plaintiff and board away from home, though the net wages available to support their families would have been small. We think it has not been proved that the refusal of the relief authorities to thus forcibly recruit workmen for the plaintiff was so inconsiderate of the plaintiff's difficulties as to be a breach of the Government's implied contract."

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[12] Supra p. 4.

* Compare the analogies set forth in "Public Wrong and Private Action," 27 Harvard Law Review, 312, by Dean Ezra R. Thayer.

But the expressed major premise that the Government's failure to handle the mass of relief labor according to statutory requirements must have been in some special sense "inconsiderate of the plaintiff's difficulties" quite clearly involves a false and untenable legal assumption. Any substantial prevention or hindrance of petitioner's discharge of its contract duties would be sufficient to constitute a breach of contract. Harmful and actionable breaches of contract are not confined to cases where the Government has been markedly or quite unreasonably "inconsiderate of the plaintiff's difficulties." In this case the facts even as outlined by the Court of Claims in the particular excerpt just quoted indicate that the Government, by a refusal and failure to perform its statutory duties with reference to releasing or transferring workmen on the relief rolls back into private employment, has substantially hindered an "occurrence or performance requisite under the contract," namely, the preferential employment of relief labor. Petitioner, if confined to the use of certain classes of labor, is entitled to have its access to the indicated labor groups free from "prevention or hindrance" caused by conduct of the Government directly in violation of controlling statutes framed for the very purpose of securing the free flow of relief labor back to private employment.

The petitioner does not contend that the United States should have compelled "men on the relief rolls" to work for petitioner in the sense of exerting physical compulsion or any illegal compulsion. The petitioner contends merely that the agencies of the United States should have complied with their statutory duties with reference to removing from the relief rolls men who had been referred or ought to have been referred for assignment to work in private employment and had failed to engage in or start upon such work. If the agencies of the United States had complied with their

statutory duty in this respect, this would, indeed, have had the effect of bringing a certain economic and practical pressure to bear upon these men referred for assignment to work on petitioner's project to engage actually in such work, but such a result is exactly the result contemplated by the statutory provisions in question. The Court of Claims confuses the issue by using such colorful phrases as "forcibly recruit workmen for the plaintiff." It is incorrect and highly unfair to suggest that the execution of a statutory duty is tantamount to illegal compulsion or the use of physical force.

Fifth. The Court of Claims erred in disposing of petitioner's contention that respondent's violation of the provisions of 50 Stat. 352 [13] was, in legal effect, a breach of contract on the part of the United States on the basis of the following proposition stated in its opinion: "We think it has not been proved that the refusal of the relief authorities to thus forcibly recruit workmen for the plaintiff was so inconsiderate of the plaintiff's difficulties as to be a breach of the Government's implied contract."

Here again the Court of Claims refers to the "fair consideration" test as the determining factor with reference to respondent's liability. It would seem that the duty of officers of the United States to comply with the provisions of statutes of the United States does not depend upon the existence of any special difficulties and problems in the way of any particular contractor. Much less does it depend upon the point that "fair consideration" or any special ethical consideration might require that the Government should remove from the relief rolls persons who had been referred or ought to have been referred for assignment to work on the petitioner's project. The statutory mandate

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[13] Supra p. 4.

(50 Stat. 352) is plain and direct and admits of no exceptions relevant to the present controversy. The breach of this statutory duty was the direct and immediate cause of harm to the petitioner in the form of a continuing labor shortage. It was plainly proved by Exhibit "A", attached to this petition and brief, which was in evidence before the Court of Claims, that there were great numbers of men on relief in the immediate vicinity where petitioner's project was being conducted and that these men were retained on relief in violation of the statutory requirements, notwithstanding that they should have been referred to petitioner's project in conformity with the requirements of the statute (50 Stat. 352)[14] and Executive Order 7060,[15] Regulation No. 2, the latter of which was referred to and made a part of the contract in Article 19.

The language used by the Court of Claims and referred to in the present specification of error shows the special animus of that Court with respect to the issues presently under litigation in more than one particular. For example, the use of the expression "the refusal of the relief authorities to thus forcibly recruit workmen for the plaintiff" indicates that the Court felt that to remove men from the relief rolls would be like dragging them forcibly as physical victims to work on petitioner's job. But the pressure involved in removing these individuals from the relief rolls would only have been such pressure as the statute obviously contemplated and required. It ought not to be stigmatized as *forcible* in any event. The denial of probable benefit is not equivalent to the use of force and should not be assimilated with the odious associations that relate to the use of physical violence by public officers. As was said by Mr. Justice Stone in *United States* v. *Butler*, 297 U. S. 1, 86, 56 S. Ct. 312, 328, 80

[14] Supraa p. 4.

[15] Supra p. 7.

L. Ed. 477, 499, "If the expenditure is for a national public purpose, that purpose will not be thwarted because payment is on condition which will advance that purpose. The action which Congress induces by payments of money to promote the general welfare, but which it does not command or coerce, is but an incident to a specifically granted power, but a permissible means to a legitimate end."

The statement of the Court of Claims that "it has not been proved that the refusal of the relief authorities • • • was so inconsiderate of the plaintiff's difficulties as to be a breach of the Government's implied contract" shows again the exacting nature of the test which the Court of Claims had in mind. What proof could the petitioner adduce to demonstrate that the failure of the respondent to comply with the statutory requirement was specifically and excessively "inconsiderate" of its difficulties, other than the showing of the protracted and harmful delays due to the continuous labor shortage which was, in turn, caused by the failure of the United States Employment Service to process through its technical procedure either men whom petitioner could have employed "off the street" or men who ought to have been referred for assignment to work on petitioner's project who were drawing relief payments through long periods in the district where petitioner's project was under operation? Ample proof of such delays and of the dominant part played by agencies of the United States in causing such delays through their failure to transfer to petitioner labor that was actually available is contained in the record. Since the difficulties of the petitioner in this regard lasted for many months and caused a delay of 149 days in the performance of the contract, it would seem clear that the difficulties were not of so slight or transitory a character that the agencies of the United States could ignore them without being markedly

"inconsiderate." Since the work on petitioner's project was finished by 91 days of actual new work in 1938 (that is, work in addition to repairing damages and displacements that occurred during the winter of 1937 and 1938), it is clear that the entire work could have been finished in the fall of 1937 if the 149 days delay caused by labor shortages occurring prior to November, 1937, could have been eliminated. The action of the agencies of the United States was "inconsiderate of the plaintiff's difficulties" in the sense that it ought to have been foreseen that great damages would accrue to the petitioner due to the prolongation of the work brought about by the continuous labor shortage.

If it be assumed that the conduct of the agencies of the United States caused or contributed to cause the labor shortages whose harmful effects on petitioner could easily have been anticipated, there can be no real ground for saying that the agencies of the United States were not "inconsiderate" of petitioner's difficulties. In ordinary civil relations, where one party does an act which he ought to foresee would cause harm to another party, and harm is in fact thus caused, the case may ordinarily be treated as one of actionable negligence. In the present case, where the parties are bound together by an elaborate formal contract and affirmative duties are assumed by each of the parties, any failure of either party to perform an affirmative duty should be regarded as "inconsiderate" in instances where it was foreseen or ought to have been foreseen that substantial damages would result from the failure to perform the affirmative duty in question.

Sixth. While the statement of the Court of Claims that it had insufficient evidence of damages from June 15, 1938, to the completion of the work may perhaps be disregarded in view of the actual holding that the Government was not liable under the contract, the plain fact is that evidence

was presented of damages claimed, by units of a day, on either a one, two or three shift basis. Petitioner could, of course, not anticipate the actual number of days delay for which the Court might award it damages, and did not burden the record with total computations covering all period of time from one to one hundred and forty-nine days. It did prove its damages for the total delays claimed in the petition, and itemized them by daily and shift units. On the evidence presented the Court of Claims could, and can, figure damages for any given period by a simple mathematical calculation.

ROBERT P. SMITH,
CHARLES S. COLLIER,
Attorneys for Petitioner.

APPENDIX A

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF LABOR AND INDUSTRY, HARRISBURG

July 15, 1940.

Robert P. Smith, Esq.,
815 15th Street, N.W.,
Washington, D. C.

DEAR MR. SMITH:

Acknowledgment is made of your inquiry of June 1 with reference to the number of persons registered with the Pennsylvania State Employment Service and drawing relief in several classifications from August 1935 through October 1938.

You requested records, or certified copies thereof, from the Kittanning and Greensburg Offices. Since Kittanning (Armstrong County) and Greensburg (Westmoreland County) are located in Employment District No. 9, and serve the same area, the figures have been consolidated, and appear on the attached table. These offices were designated to supply the labor for the construction of lock and dam #9 on the Allegheny River, Armstrong County, Rimer, Pennsylvania.

Sincerely yours,

LEWIS G. HINES,
Secretary of Labor and Industry.

LGH:B:W.

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF STATE

I hereby certify that the classified occupational groups indicated on the attached table are a true and correct tabulation of the number of persons drawing relief and registered for relief employment at Kittanning (Armstrong County) and Greensburg (Westmoreland County) by the Pennsylvania State Employment Service by months from August 1935 through October 1938, and that the afore-

said offices were designated to supply the labor for construction of lock and dam #9 on the Allegheny River, Armstrong County, Rimer, Pennsylvania. As the men registered were referred to various jobs, they were taken off the relief rolls which accounts for the fluctuation in the number shown in the monthly tabulations, leaving the number of registrants as shown in attached schedules as referrals available for other jobs.

The seal of the Department of Labor and Industry is herewith affixed.

LEWIS G. HINES,
Secretary of Labor and Industry.

SELECTED OCCUPATIONAL GROUPS REGISTERED IN THE GREENSBURG AND KITTANNING OFFICES—DISTRICT #9 OF THE PENNSYLVANIA STATE EMPLOYMENT SERVICE BY MONTHS AUGUST 1935–OCTOBER 1938*

Occupational Group	1935					1936												1937	
	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.
Mechanics	343	344	345	341	346	356	362	369	371	365	361	339	329	312	308	277	257	253	248
Carpenters	1084	1089	1093	1083	1098	1130	1149	1172	1178	1160	1149	1077	1046	921	911	818	757	745	730
Laborers	2743	2757	2766	7519	7625	7845	7981	8144	8185	8064	7985	7491	7281	6409	6341	5690	5264	5183	5074
Drillers	14	14	14	14	14	14	14	14	14	14	14	13	13	11	11	10	9	9	9
Dinkey Operators	16	16	16	16	16	16	16	16	16	16	16	15	15	14	14	13	12	12	12
Whirley Operators [1]	At no time during the period in question did the Kittanning or Greensburg office register Whirley Operators. This is a special and technical job and there is an infrequent demand for this type of labor.																		
Crane Operators	209	210	211	209	212	218	222	226	227	224	222	209	203	179	177	158	147	145	142
Bulldozer Operators	18	18	18	18	18	18	18	18	18	18	18	17	17	15	15	13	12	12	12
Electric Helpers [2]	Electrical helpers, as such, are not registered. They are carried under the general classification of electricians, and the same system applies to mechanics' helpers and mechanics.																		
Oilers	39	39	39	39	39	40	40	41	41	41	41	38	37	33	33	30	27	27	27
Truck Drivers	1455	1463	1568	1553	1575	1621	1649	1682	1691	1666	1650	1548	1505	1325	1059	960	879	866	848
Firemen	223	224	325	322	327	336	341	348	349	344	340	319	310	273	270	243	224	220	215
Pump Men	35	35	35	35	35	36	37	38	38	37	37	35	34	30	30	27	25	25	25
Mixer Operators	47	47	47	47	48	49	50	51	51	50	50	47	46	41	41	37	34	34	33
Comb Welders	40	40	40	40	41	42	43	44	44	43	43	40	39	34	34	31	29	29	28
Mechanic Helpers [3]	(Explained under footnote #2)																		
Form-Carpenters	49	49	49	49	49	51	51	53	53	53	53	49	47	41	41	37	35	35	35
Electricians	233	234	235	233	237	244	249	254	255	251	249	234	227	200	198	178	165	163	160
Caisson Laborers [4]	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
	No differentiation is made between laborers and caisson laborers, for it is understood that the only distinction between these types are the willingness of a laborer to work in a caisson for a slightly higher wage, but with no greater or lesser skill.																		
Pile Driving Men	9	9	9	9	9	9	9	9	9	9	9	9	8	8	7	7	7	7	7
Blacksmiths	216	217	217	215	218	225	229	233	234	230	228	214	208	183	181	162	150	147	144

* Offices operated by National Reemployment Service prior to 1938.

SELECTED OCCUPATIONAL GROUPS REGISTERED IN THE GREENSBURG AND KITTANNING OFFICES—DISTRICT #9 OF THE PENNSYLVANIA STATE EMPLOYMENT SERVICE BY MONTHS AUGUST 1935–OCTOBER 1938*

Occupational Group	1937										1938									
	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.
Mechanics	344	335	320	318	319	206	194	172	165	184	371	415	357	397	446	497	534	575	483	509
Carpenters	1204	1175	1122	1114	1119	912	861	760	727	808	980	1093	927	1027	1145	1274	1361	1463	1219	1285
Laborers	7041	6872	6563	6514	6547	4130	3898	13457	3312	3683	5379	6003	5109	5663	6321	7034	7527	8097	5610	5923
Drillers	52	51	49	49	49	46	43	39	37	41	89	98	78	85	91	100	104	111	89	93
Dinkey Operators	17	17	16	16	16	16	15	14	13	14	19	21	18	20	22	25	26	27	22	23
Whirley Operators [1]	At no time during the period in question did the Kittanning or Greensburg office register Whirley Operators. This is a special and technical job and there is an infrequent demand for this type of labor.																			
Crane Operators	346	338	323	321	322	215	203	180	173	193	321	360	316	353	400	447	483	522	443	468
Bulldozer Operators	23	23	22	22	22	21	20	17	16	18	25	28	23	25	28	31	32	34	28	29
Electric Helpers [2]	Electrical helpers, as such, are not registered. They are carried under the general classification of electricians, and the same system applies to mechanics' helpers and mechanics.																			
Oilers	44	43	41	41	38	37	35	31	30	32	51	57	49	55	62	69	74	80	67	70
Truck Drivers	2317	2262	2160	2144	2155	1669	1575	1397	1339	1489	1861	2081	1787	1986	2226	2481	2664	2870	2407	2440
Firemen	424	413	394	391	392	308	291	258	247	275	374	417	353	391	435	484	517	556	462	487
Pump Men	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
Mixer Operators	45	44	43	43	43	40	38	33	32	36	32	36	31	35	39	44	47	50	42	44
Comb Welders	46	45	43	43	43	47	44	39	38	42	157	176	154	172	195	218	235	254	215	227
Mechanic Helpers [3]	(Explained under footnote #2)																			
Form Carpenters	65	63	60	60	60	88	83	74	71	79	73	81	64	72	78	86	90	96	78	81
Electricians	178	174	166	165	166	109	103	91	87	97	197	222	196	219	249	279	302	327	278	294
Caisson Laborers	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
	No differentiation is made between laborers and caisson laborers, for it is understood that the only distinction between these types are the willingness of a laborer to work in a caisson for a slightly higher wage, but with no greater or lesser skill.																			
Pile Driving Men	12	12	12	12	12	11	10	9	9	10	8	9	7	7	7	8	8	8	6	6
Blacksmiths	204	199	190	189	190	169	159	141	135	150	224	249	212	235	262	291	311	334	278	293

* Offices operated by National Reemployment Service prior to 1938.

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF STATE

OFFICE OF THE SECRETARY OF THE COMMONWEALTH

Harrisburg, July 17, 1940.

PENNSYLVANIA, ss:

I, S. M. R. O'Hara, Secretary of the Commonwealth of Pennsylvania, having the custody of the Great Seal of Pennsylvania do hereby certify, that it appears by the records of this office that Lewis G. Hines now is Secretary of Labor and Industry in and for the Commonwealth of Pennsylvania, U. S. A., duly appointed, commissioned and qualified, for a term to compute from the seventeenth day of January, Anno Domini one thousand nine hundred and thirty-nine, and ending the third Tuesday of January, Anno Domini one thousand nine hundred and forty-three, and until his successor shall have been appointed and qualified, and as such officer is authorized to perform and discharge all the duties of Secretary of Labor and Industry, as required by law.

That full faith and credit are due and ought to be given to his official acts accordingly.

In Testimony Whereof, I have hereunto set my hand and caused the Great Seal of the State to be affixed, the day and year above written.

App'd 7/17/40. ADS.

[SEAL.] S. M. R. O'HARA,
Secretary of the Commonwealth.

(2162)

INDEX

CITATIONS

682541—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 692

YORK ENGINEERING AND CONSTRUCTION COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Claims (R. 78–90) are not as yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered October 1, 1945 (R. 91). The petition for a writ of certiorari was filed December 26, 1945. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925 as amended.

QUESTIONS PRESENTED

A contract for the construction of a public work provided that persons employed on the project should be referred for assignment to work on such project by the United States Employment Service, and that 90% of the labor so employed should be taken from relief rolls.

The substantial question arising in a suit on this contract seeking damages from the United States for delay resulting from labor shortages is whether this provision made the United States an insurer of the contractor's labor supply, or whether the United States discharged its obligation when it applied the provisions of the contract with fair consideration for the problems and difficulties of the contractor, making it possible to get his work done by granting exemptions from the relief labor requirement and by granting extensions of time for completion to allow for labor shortages.

STATUTES, REGULATIONS AND CONTRACT PROVISIONS INVOLVED

The applicable portions of the statutes, regulations and contract provisions involved are set forth in the Appendix, *infra*, pp. 18–22.

STATEMENT

The pertinent facts as found by the Court of Claims may be summarized as follows:[1]

[1] Petitioner did not proceed under Rule 99 (b) of the Court of Claims to have any of the evidence certified. Accord-

On August 5, 1935, petitioner entered into a contract with the United States to construct Lock and Dam No. 9 and to perform alterations on Dam No. 8, Allegheny River, Pennsylvania, within 450 calendar days after date of notice to proceed (R. 45–46). During the performance of the work, the contract was modified by 19 change orders, and the time for completion was extended 468 calendar days, thus fixing March 31, 1938 as the completion date (R. 46). The work was not completed until October 6, 1938, and liquidated damages in the sum of $50,375 were assessed against petitioner. However, the Chief of Engineers granted an additional extension of time of 189 days, thus excusing the delay, and the amount of $50,375 which had been withheld as liquidated damages, was thereafter paid to petitioner (R. 46).

Article 19 (a) of the contract provided that all persons employed on the project (except supervisory, administrative, and highly skilled workers) should be referred for assignment to such work by the United States Employment Service

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ingly, the record before this Court, so far as facts are concerned, consists exclusively of the special findings of fact made by the court below. A large part of petitioner's statement is argumentative and has no basis in the record, *e. g.*, that petitioner would have completed the work in 1937 (Pet. 10); that it required through June 14, 1938 to repair damages caused by winter floods (Pet. 9); and that there was at all times an adequate supply of employables available (Pet. 11).

and that, except under specific exemption by the Works Progress Administration, at least 90% of all such unskilled labor should be taken from the public relief rolls (R. 48). Westmoreland and Armstrong Counties, Pennsylvania, the sources from which petitioner was to draw its labor, were largely rural (R. 50). Petitioner made an investigation of the labor situation, and, at the time it commenced work, the number of persons on relief in the two counties was sufficient to supply the project with the required amount of labor (R. 50–51). However, during the course of the performance of petitioner's work, other projects, undertaken to relieve unemployment, absorbed much of the relief labor (R. 50).

In the course of petitioner's operations, the United States Employment Service through the National Reemployment Service (N. R. S.), referred to petitioner's project all labor in the appropriate classifications available under its rules and regulations (R. 54).[2] The Works Progress

[2] The court below found (R. 51):

"The procedure for requisitioning and referral of workmen to plaintiff's project was explained to plaintiff by NRS during the early part of the job. At the beginning of the project, when a requisition came in, the NRS office selected from names of workmen registered in its office all persons in the categories requisitioned who were on relief, considered their qualifications for employment and referred to the contractor those it deemed qualified. Subsequently, the procedure was changed so that when a requisition was received at the employment office, NRS would requisition from the

Administration (W. P. A.), which made relief labor available to N. R. S. declined in some instances to make such labor available when it was employed on other projects, which related to health or public safety, and declined to make available workmen who, because of the distance which they lived from the project, would encounter transportation and boarding difficulties (R. 54). However, N. R. S. procured exemptions from the Works Progress Administration, allowing it to refer labor which the petitioner had requested be assigned to the project although such labor was not on the public relief rolls (R. 54). Such exemptions, once they were obtained, remained in effect throughout the performance of the contract (R. 51). Petitioner was likewise permitted to utilize the labor available for more than the stipulated maximum working hours (R. 53).

Works Progress Administration (hereinafter referred to as 'WPA'), sufficient relief labor to refer to the contractor, and WPA made labor available for such referral to NRS in the following categories: First, from persons then working on WPA projects; second, from persons awaiting reassignment to WPA projects; and third, from persons awaiting initial assignments to WPA projects. In the event that those three categories did not provide sufficient labor, WPA was then required to give NRS an exemption from the referral of relief labor, and nonrelief labor was referred to the project.

"A worker referred would be given a referral or assignment slip which he was to take to the contractor and present himself as an applicant for work. Duplicates of this assignment slip were also mailed to the contractor, who was to advise NRS as to whether the man was hired."

Despite the foregoing measures, petitioner suffered delays in performance of the contract because of an insufficient labor force and N. R. S. was unable at various times to refer sufficient labor to enable petitioner to maintain a full complement (R. 53–54). Petitioner's difficulties in this respect were aggravated because, since a considerable amount of the work involved was both unpleasant and intermittent (R. 54–55), its labor turnover was considerable (R. 55), and because of petitioner's insistence in the requisitions it made upon the Employment Service for labor that such labor be thoroughly experienced and equipped (R. 55).[3]

[3] The court below found (R. 55):

"Plaintiff in ordering its labor from the Employment Service specified qualifications for the workmen it desired. On August 24, 1938, it ordered 15 carpenters, the requisition reciting that they 'must have thorough knowledge of the trade and have tools; previous experience on dam construction necessary.' May 7, 1938, plaintiff requisitioned 3 crane operators, the requisition stating that 'they must be thoroughly experienced in operation, care and adjustment on Lorain 75–A crane and shovels.' May 8, 1938, plaintiff ordered 1 dipper tender, the requisition stating that 'he must have had at least 10 years' experience in operation of dipper or dipper dredge.' Also 3 dredge firemen who must be 'thoroughly trained and experienced in firing boilers of all types of floating equipment; cleaning flues and installing and repairing tubes; operating spudding engine, nigger-heads, etc., and shall operate dredge in emergencies.' Also 4 deckhands who shall have 'extensive experience on naval equipment, skilled in throwing lines, etc.' Also 1 cook who 'shall have at least 10 years' experience as cook on floating equipment.'

Petitioner was granted extensions of contract time on account of insufficient labor in the aggegate of 131 days for the years 1935, 1936, and 1937 (R. 54, 56). The court below found that the formula employed in determining these delays was incorrect and that the more correct computation was 103 days (R. 54). In 1938 petitioner was allowed an additional 18 days' extension because of a labor shortage (R. 54). Petitioner unquestionably suffered delays due to the inability of N. R. S. to supply a sufficient number of workmen to the project (R. 71). However, petitioner suffered material delays which were not attributable to a shortage of labor and its failure to complete operations by November 1937 was a result of the combined operations of the delays due to a shortage of labor and other causes (R. 71). With an adequate supply of labor, the project would probably have been completed about June 15, 1938 (R. 71).

November 16, 1938, petitioner filed an itemized claim with the War Department alleging various breaches of contract by the Government and seeking damages therefor and the remission of liqui-

June 21, 1938, plaintiff ordered 4 laborers who must be 'physically fit, willing to do a fair day's work and have previous experience on dam construction.' July 7, 8, and 9, 1938, plaintiff ordered 150 laborers who must be 'physically fit and willing to do a fair day's work with pick and shovel. Will be required to work in water and must report for work supplied with hip boots.' "

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dated damages. The Government was thus advised for the first time that petitioner intended to claim damages against it (R. 69). All liquidated damages assessed against petitioner were thereafter remitted on the recommendation of the Chief of Engineers (R. 69–71), but petitioner was not awarded damages against the United States.

On October 18, 1940, petitioner filed its petition in the court below alleging sixteen causes of action (R. 6–15), of which all but the Second, Third, Twelfth and Fourteenth were bottomed on an alleged breach of contract on the part of the Government for "failure to furnish an adequate supply of labor" (R. 7 *et seq.*). The court below denied recovery on all but petitioner's Fourteenth cause of action, which is unrelated to the issues here presented.[4] Petitioner does not seek review of the dismissal of its Second, Third, and Twelfth causes of action, but asserts that the court below erred in denying it recovery for damages assertedly suffered by reason of the breach of an obligation allegedly assumed by the Government under the contract to supply and maintain a full labor complement.

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[4] The United States has filed a conditional cross-petition for a writ of certiorari requesting review by this Court of that feature of the decision below in the event, and only in the event, that the Court grants the petition here involved. *United States* v. *York Engineering and Construction Company*, No. 783, this Term.

ARGUMENT

The court below, rejecting petitioner's contention that the Government undertook the responsibility of supplying petitioner with sufficient workers, held that Article 19 of the contract basically was a promise by petitioner not to employ labor except as therein provided, and that the Government only undertook "to apply the provisions of the article with fair consideration for the problems and difficulties of the contractor, and to make it possible for him to get his work done, if there was not enough relief labor available, but there were persons not on relief who desired to work for the plaintiff" (R. 79–80). It further held that here the Government had complied with its obligations, and that it was not responsible for the "factors" which prevented petitioner "from getting enough men" (R. 81). It rejected petitioner's contention that the Government should have cancelled the requirements of Article 19, holding that the entire purpose of the relief programs, of which petitioner's project was a part, would otherwise be defeated in its humanitarian purpose of procuring work for those on relief (R. 81), and further that a cancellation of Article 19 would have made no substantial difference in petitioner's labor situation (R. 82). Finally, it rejected petitioner's contention that the Government should have shut down other relief projects to compel men to accept employment with

petitioner. We submit that in so holding the court below was correct.

1. Article 19 does not in terms constitute the United States an insurer of petitioner's labor supply, and there is nothing elsewhere in the contract to suggest that the United States impliedly assumed any greater duty than the court below ascribed. Indeed the contrary would seem to be the case. That part of Article 9 of the standard form contract which deals with excuses for delay, *infra*, pp. 20–22, was specifically modified by the incorporation of an extra provision (R. 21, 28) which excused the contractor from liability for liquidated damages for delay caused by "insufficient supply of qualified labor from offices designated by the United States Employment Service." This clearly indicates that the parties contemplated the possibility of delay from such cause and also fixed the obligation of the United States in that event, namely, to grant a corresponding extension of time. Cf. *United States* v. *Rice*, 317 U. S. 61, 64–65. As noted above, extensions were duly granted, and liquidated damages occasioned by additional delay were remitted.

Petitioner vigorously urges however that, if Article 19 does not make the Government an insurer of its labor supply, it does place a duty upon the Government to waive Article 19 in its entirety if it were impossible for the employment services to furnish, at all times, the number and type of

laborers required. We think, however, that the court below properly rejected this contention. It is inconceivable that the Government, which had undertaken a vast nation-wide work relief program of which the instant project was a part, intended that that program should be impaired because some difficulty in procuring qualified labor might at times be encountered. As the court below observed, it was necessary that the Government keep a careful check on the roll of employees to make certain that the public moneys expended for the purpose of relieving distress should go to those who were in such distress as to be eligible for the relief rolls. The mechanics adopted by the Government to effectuate this purpose were those set forth in Article 19; to make certain that those referred to the work should be persons in need, the contract required that the employees referred to the employer by the United States Employment Service should be taken from the public relief rolls unless the Works Progress Administration should otherwise authorize. It is clear that, if Article 19 were completely waived, the tendency would be to recruit labor among persons not on relief, on the assumption that the more skilled laborers would not be on relief rolls. The court below accordingly concluded that, while the Government was under an obligation to see that the contractor was not unduly delayed, nevertheless it complied with that obligation when it

gave fair consideration to the problems and difficulties of the contractor "so as to enable him to get his work done." We submit that the obligation, if any, assumed by the United States under Article 19 went no further than this.[5]

2. The Government gave due consideration to the difficulties of petitioner in respect of its labor requirements and such labor shortage as resulted was due to circumstances for which the Government was not responsible. When N. R. S. was unable completely to fill petitioner's requisition for workmen, the contracting officer obtained exemptions from W. P. A. so that nonrelief labor

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[5] Petitioner also urges that the decision below is in substantial conflict with the prior decision of the Court of Claims in *Young-Fehlhaber Pile Co.* v. *United States*, 90 C. Cls. 4, and that an authoritative decision by this Court is required to settle the divergence of views between that case and the instant case. Petitioner contends that a uniform rule of law, rather than one dependent on the facts of each case, should be established which should be applicable to all cases of this character. Aside from the fact that the court below found no conflict with the *Young-Fehlhaber* case (R. 82), it is significant to note that consistently since that decision the Court of Claims has tended to dispose of each case on its peculiar facts. This we think is the appropriate approach to the problem as the facts in each case, depending upon the consideration which the Government gave to the contractor's difficulties, should control the ultimate diposition thereof. *Seeds & Derham* v. *United States*, 92 C. Cls. 97, 115–116, certiorari denied, 312 U. S. 697; *Western Construction Co.* v. *United States*, 94 C. Cls. 175, 199–200; *Nolan Brothers* v. *United States*, 98 C. Cls. 41, 81–82; *Merritt-Chapman & Whitney Corp.* v. *United States*, 99 C. Cls. 490, 546–547; *Frazier-Davis Construction Co.* v. *United States*, 100 C. Cls. 120, 158–161.

might be referred to petitioner (R. 51). Once the exemptions were obtained they remained in effect throughout the performance of the contract (R. 51). At critical times permission was granted petitioner to work laborers more hours per week than the 30 specified in the contract. Thus, on December 11, 1935, petitioner was authorized to employ manual labor not more than 8 hours in one calendar day and not more than 40 hours in any one week (R. 53); on May 13, 1936, petitioner was authorized to work carpenters not more than 56 hours in any one calendar week (R. 53); on June 19, 1936, petitioner was permitted to employ tractor operators not more than 56 hours in any one calendar week (R. 53). Where it had an exemption from W. P. A. for men of the classification requested, N. R. S. also referred men whom plaintiff had requested be assigned to the project even though such men were not on relief.

The difficulties which brought about shortages of an adequate supply of labor were not attributable to the Government. Working conditions were not attractive, much of the work having to be done in water (R. 54). There were occasions when rain and cold prevented petitioner from carrying forward the work for more than two or three days a week and workmen were unable to earn enough in a week to make the job worthwhile (R. 54). Many workmen quit to accept employment in coal mines and other projects which

afforded better wages and more satisfactory working conditions (R. 55). Petitioner granted releases to many workmen at such times if it could not assure the men that they would earn reasonable wages (R. 55). Petitioner's requisition for men specified qualifications not likely to be met by many persons living in the area of the work. See note 3, pp. 6–7, *supra*. Certainly in view of the foregoing it could not be said that petitioner's inability to obtain an adequate supply of labor resulted from the failure of the Government to waive Article 19 of the contract. Persons not on relief would be even more unwilling to accept unattractive employment. We submit that the court below was fully justified in concluding that even had Article 19 been waived it would not have materially improved petitioner's labor situation.

3. Finally petitioner contends that the Government violated the terms of the contract because it failed to enforce the provisions of the Emergency Relief Act of 1937, *infra*, pp. 18–19, which forbade the employment of laborers on relief work where they refused to accept an offer of private employment under reasonable working conditions at the same or a greater wage.

This contention is without merit for a number of reasons.

To begin with, the present record contains no evidence that any person on relief, refusing to accept employment with petitioner, continued to

be carried on the relief rolls. The only finding (R. 54) in this respect is that W. P. A. declined to make certain workmen available who were on relief but who were employed on projects carried on under its own supervision which concerned the public health and safety of the community, and similarly declined to make available workmen who lived a considerable distance from petitioner's project and who would be subjected to transportation and boarding difficulties if required to work on petitioner's project.[6]

Next, the Act in question provides that the private employment offered must involve reasonable working conditions. The court below has found in the instant case that at times the work-

[6] Petitioner has appended to its petition an exhibit said to represent the Pennsylvania State Employment Service registration by occupation of employables at Greensburg and Kittanning, Pennsylvania, between August 1935 and October 1938. This is not part of the record before this Court. Had petitioner deemed it desirable to bring evidence of this character before this Court it should have proceeded under Rule 99 (b) of the Court of Claims. It should have made an assignment of error as to the failure of the Court of Claims to make an appropriate finding and requested that this and such other evidence as it deemed material to the error assigned should be incorporated in the record. Had petitioner followed this course, the Government in turn would have counter-designated evidence which justified the court below in refusing to make the finding, such as the examination of the State official in charge of this exhibit which cast grave doubts on its accuracy. Petitioner has advanced no reason as to why it failed to comply with the appropriate rules of the court below in this respect.

ing conditions at petitioner's project were bad (R. 54–55), and that the financial return of persons who lived a considerable distance from the project would be small (R. 54). Petitioner itself at times granted releases to many workmen when it could not give them sufficient work to enable them to earn a reasonable wage (R. 55).

Finally—though this point cannot be reached on the present record—the statutory provision in question was enacted for the benefit of the public, and not of petitioner or persons similarly situated. Like other provisions of relief legislation, it was designed to insure that the expenditure of public funds for relief should benefit the persons most in need of relief. The provision requiring the dismissal of any person who refused a *bona fide* offer of private employment effectuated that purpose. In no sense was the legislation intended to inure to the benefit of the private employer, least of all when such employer invokes it as a basis for imposing legal liability on the United States.

CONCLUSION

The decision below is correct and there exists no conflict. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
FREDERICK BERNAYS WIENER,
Special Assistant to the Attorney General.
PAUL A. SWEENEY,
BONNELL PHILLIPS,
Attorneys.

FEBRUARY 1946.

APPENDIX

STATUTES

The Emergency Relief Appropriation Act of June 29, 1937, c. 401, 50 Stat. 352, 353–354, 357, provides in part:

TITLE I

* * * *Provided,* That no person employed on work projects and certified as in need of relief who refuses a bona-fide offer of private employment under reasonable working conditions which pays as much or more in compensation for the same length of service as such person receives or could receive under this appropriation and who is capable of performing such work, shall be retained in employment under this appropriation for the period such private employment would be available: *Provided further,* That any person who takes such private employment shall at the expiration thereof be entitled to immediate resumption of his previous employment status under this appropriation if he is still in need of relief and if he has lost the private employment through no fault of his own.

* * * * *

SEC. 2. In carrying out the purposes of the foregoing appropriation the President is authorized (a) to prescribe such rules and regulations as may be necessary and to utilize agencies within the Government and to empower such agencies to prescribe rules and regulations to carry out the functions

delegated thereto by the President: *Provided,* That the rates of pay for persons engaged upon projects under the foregoing appropriation shall be not less than the prevailing rates of pay for work of a similar nature in the same locality as determined by the Works Progress Administration with the approval of the President;

* * * * *

TITLE II

SEC. 201. The Federal Emergency Administration of Public Works (herein called the "Administration") is hereby continued until July 1, 1939, and until such date is hereby authorized to continue to perform all functions which it is authorized to perform on June 29, 1937. All provisions of law existing on June 29, 1937, and relating to the availability of funds for carrying out any of the functions of such Administration are hereby continued until July 1, 1939, except that the date specified in the Emergency Relief Appropriation Act of 1936, prior to which, in the determination of the Federal Emergency Administrator of Public Works (herein called the "Administrator"), a project can be substantially completed is hereby changed from "July 1, 1938" to "July 1, 1939."

REGULATIONS

Executive Order No. 7060, June 5, 1935, Prescribing Rules and Regulations Relating to Procedure for Employment of Workers under the Emergency Relief Appropriation Act of 1935—Regulation No. 2, Works Progress Administration, provides as follows:

SECTION 5. Only persons certified for assignment to work by the United States Employment Service shall be employed on projects: Provided That for the purpose of effectuating the purposes of paragraph I (C) of Executive Order No. 7034 of May 6, 1935, the Works Progress Administrator or the State Works Progress Administrators are hereby authorized in their discretion to modify this requirement in connection with any project not operated under contract.

SECTION 6. All persons (a) who are employed on projects conducted by the State Emergency Relief Administration and continued by the Works Progress Administration, and who are otherwise eligible, or (b) who are certified by the United States Employment Service as eligible for employment on projects to be conducted by the Works Progress Administration shall be regarded as continuously certified for assignment to work on projects to be conducted by the Works Progress Administration unless they are requisitioned by the United States Employment Service for employment on other projects, in other public work, or in private industry.

CONTRACT PROVISIONS

The contract provisions involved are as follows:

ART. 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government, may, by written notice to the contrac-

tor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted, the amount is set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided,* That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, insufficient supply of qualified labor from offices designated by the United States Employment Service, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or

delays of subcontractors due to such causes: *Provided further,* That the contractor shall within 10 days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

ART. 19. (*a*) *Labor preferences.*—With respect to all persons employed on projects, except as otherwise provided in Regulation No. 2, (*a*) such persons shall be referred for assignment to such work by the United States Employment Service, and (*b*) preference in employment shall be given to persons from the public relief rolls, and except with the specific authorization of the Works Progress Administration, at least ninety per centum (90%) of the persons employed on any project shall have been taken from the public relief rolls; *Provided however,* that, expressly subject to the requirement of subdivision (*b*), the supervisory, administrative, and highly skilled workers on the project, as defined in the specifications, need not be so referred by the United States Employment Service.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1940

End